United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLYDE L. HARDY and LEE ROY FERGUSON, Appellants, v. UNITED STATES OF AMERICA, Appellee.	)	NOS. 18,079 and 18,148

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APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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By Appointment of This Court

November 27, 1963

STATEMENT OF QUESTIONS PRESENTED

The questions are:

1. Whether appellants were denied the speedy trial guaranteed them by the Sixth Amendment when their trial took place approximately one year after commission of the alleged crimes, when no part of such delay was attributable to appellants and when seven to eight months of such delay resulted solely from the Government's deliberate and purposeful forebearance to inform appellants of their offenses, though it had full knowledge thereof.

2. Whether in the circumstances outlined in question 1 above appellants were denied the fair trial guaranteed them by the due process clause of the Fifth Amendment.

3. Whether appellants were unduly prejudiced by the trial court's failure and refusal to charge the jury that the evidence of a paid police informer and former convict and narcotics user should be received with care and caution.

4. Whether appellant Hardy was unduly prejudiced by the direct testimony of a government witness as to his prior unrelated conviction that could not have been brought out on cross examination.

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FOR THE DISTRICT OF

COLUMBIA

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JURISDICTIONAL STATEMENT

Appellants were tried on pleas of not guilty before a jury in the United States District Court for the District of Columbia under indictments charging infractions of the narcotics laws (Act of August 16, 1954, 68A Stat. 550, 551, 26 U. S. C. §§ 4704(a) and 4705(a); Act of July 18, 1956, 70 Stat. 570, 21 U. S. C. § 174). The District Court had jurisdiction under the Act of June 25, 1948, 62 Stat. 826, 18 U. S. C. § 3231.

Appellants were both convicted on all counts of the indictments against them and sentenced thereon. (Judgments: Hardy R. 2; Ferguson R. 8c). Both defendants applied for leave to appeal in forma pauperis, which was granted (Hardy R. 3-4; Ferguson R. 5c), and notices of appeal were duly filed (Hardy R. 1; Ferguson R. 3c).

This Court has jurisdiction of the appeals (which were consolidated by order of the Court dated October 15) under the Act of June 25, 1948, 62 Stat. 929, 28 U. S. C. § 1291.

STATEMENT OF THE CASE

As the result of a trial that took place on August 19, 1963 before Circuit Judge J. Skelly Wright, sitting in the United States District Court for the District of Columbia, appellants Lee Roy Ferguson and Clyde L. Hardy were convicted of various offenses against the narcotics laws.[1/] Ferguson was subsequently sentenced to serve concurrent terms of five years on each of two counts and two years on a third. Hardy was sentenced to serve concurrent terms of ten years on each of two counts and five years on a third. Their appeals to this Court were allowed at government expense.

The acts for which appellants were ultimately tried and convicted took place on August 27, 1962 (Tr. 20-24), almost exactly a year before their trial. They were not arrested for these acts, or otherwise informed that the acts were deemed criminal, until after March 15, 1963, the date when a complaint first issued.

The principal government witnesses who testified against them were an "undercover" police officer named Rufus Moore and a paid informer named Atria Harris, who is referred to throughout the record as a "special employee" of the Metropolitan Police Department (see, e.g., Tr. 20, 80). Moore, a former construction worker (Tr. 27), became a member of the Metropolitan Police Department on July 9, 1962, two days after he arrived in the District (Tr. 28), and approximately six weeks before occurrence of the events for which appellants were tried (Tr. 19, 27). The officer was

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1/ Violations of the Act of August 16, 1954, 68A Stat. 550, 551, 26 U. S. C. §§ 4704(a) and 4705(a); the Act of July 18, 1956, 70 Stat. 570, 21 U. S. C. § 174.

assigned to the narcotics squad either on July 9 (Tr. 19) or "shortly thereafter" (Tr. 27). Harris is a former convict, having been convicted of larceny in 1961 and a narcotics offense in 1956 (Tr. 76), who subsists chiefly on uncertain handouts from the police (Tr. 77, 81). He is also a former user of narcotics (Tr. 77).

The evidence of these witnesses was to the effect that appellant Hardy led them to appellant Ferguson, and that on the public street on the evening of August 27, 1962, Hardy, Ferguson and Officer Moore engaged in a transaction for the purchase of narcotics. Moore, it was said, standing within a few feet of the others, passed money to Hardy, who conveyed it to Ferguson. Ferguson thereupon transferred narcotics from a paper bag without the original stamps to Hardy, who gave them to Moore without demanding or receiving a written order (see Tr. 20-22). Harris observed the transaction from an automobile some 50 feet distant (Tr. 71-72).

Appellant Ferguson took the stand and denied this testimony in toto (Tr. 112-115). He testified that he could not recall whether or not he had been in the area where the crime allegedly took place on August 27, 1962 (Tr. 114), that he did not know what day of the week August 27 fell on in that year (Tr. 113), and that he could not "remember back that far" (Tr. 117). Appellant Hardy did not testify.

In the course of the Government's direct examination of its witness Harris, the following testimony was given:

"Q. Had you seen Hardy at any time prior to August 27th, 1962?

"A. I had.

"Q. When?

"A. We had did time in the penitentiary together" (Tr. 62-63).

This answer was not expected or desired by the prosecution (Tr. 111), but it was nevertheless made in the presence of the jury and it related to the defendant who had not taken the stand and who therefore could not have been impeached on cross examination by reference to his previous criminal record. The court below denied a motion for a mistrial based on this testimony (Tr. 111).

At the trial, defense counsel requested an instruction that the evidence of Harris should be received with care and caution because he was an informer and a past user of narcotics and a convict (Tr. 118, 160-161). This instruction was denied (Tr. 159-161) despite the concession of government counsel that "he is entitled to it" (Tr. 160).

Whatever may have taken place on August 27, 1962, neither appellant had any notice, formal or informal, that his actions on that evening were considered criminal until March and April 1963 — about seven and eight months, respectively, after the date of the alleged crimes.[1/] There is no evidence that the Government maintained a continuing surveillance over these appellants. On the contrary, it did nothing as to them. It permitted them to go on for seven and eight months with no notice that anything they had done was in question, let alone alleged to be criminal.

The reason for this long delay is clear. The officer who testified against appellants was just beginning his job as an "undercover" policeman when he came into contact with them. The officer did not go "on the streets" as an "undercover" policeman until about July 20, 1962 (Tr. 28). He did

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1/ Ferguson was arrested on March 20, 1963 and Hardy on April 25, 1963. Complaints were sworn out against both on March 15, 1963; and indictments were returned on May 20 and 21 respectively.

not purchase any narcotics during his first week at his trade (Tr. 31); and he could not recall whether he had made any during the last week in July (Tr. 31-32). In fact he could not recall, testifying in August 1963, whether the alleged purchase from appellants in August 1962 had been his first, his second or his third (Tr. 32-33). In any event, it is obvious that appellants' case is one of the very first the officer had to do with. Before he was through, in the middle of March 1963, he and his assistant Harris had obtained evidence against 102 persons (Tr. 49, 77, 101). The delay in charging appellants arose simply because the officer did not "conclude his investigation" until March of 1963 (Tr. 43, 101). In short, the Government kept its knowledge of appellants' offenses secret in order that its undercover agents might not be publicly revealed as such (see concession of Government Tr. 103).

The record reveals numerous instances of lapse or blurring of memory on the part of the chief prosecuting witnesses as they testified against appellants almost a year after the event — and after they had obtained "undercover" evidence against 100 other potential narcotics defendants (see, e.g., Moore Tr. 31, 32, 33, 35, 37, 42, 43, 48; Harris Tr. 69, 70). Indeed, the Government conceded that the agents had no independent recollection of the actions for which appellants were tried and were obliged to consult their notes for refreshment (Tr. 105; see also Tr. 55, 58, 68).

Appellants did not waive their right to a speedy trial. On the contrary, their counsel below vigorously and ably pressed for a dismissal of the indictments on the ground that appellants' rights under the Fifth and Sixth Amendments had been infringed by the unconscionable delay between

the obtaining of the evidence and disclosure of the charge (Tr. 3-5, 95-98; see also comments of the court at Tr. 101-102, 106, 108). There was even a pre-trial motion to the same effect (Tr. 3; Hardy R. 6); and appellants requested no continuances (Tr. 4).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V, CONSTITUTION OF THE UNITED STATES:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

AMENDMENT VI, CONSTITUTION OF THE UNITED STATES:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

STATEMENT OF POINTS

1. The judgments should be reversed with directions to vacate the convictions and dismiss the indictments because the Government's deliberate and purposeful delay in apprising appellants of their alleged offenses deprived them of a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

2. The judgments should be reversed with directions to vacate the convictions and dismiss the indictments because the Government's deliberate and purposeful delay in apprising appellants of their alleged offenses prevented them from receiving a fair trial and they were therefore deprived of their liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

3. The judgments should be reversed with directions to hold a new trial because the trial court's failure and refusal to instruct the jury to receive the evidence of the witness Harris with care and caution because of his status as a paid informer and because of his prior narcotics addiction and conviction of crime resulted in undue prejudice to appellants.

4. As to appellant Hardy, the judgment should be reversed with directions to hold a new trial because evidence of his prior conviction, adduced in the course of the Government's direct case, resulted in undue prejudice to him.

SUMMARY OF ARGUMENT

1) and 2) Appellants were observed by a police "undercover" officer and a paid police informer on the night of August 27, 1962. Not until March 15, 1963, approximately seven months later, did the officer swear out a complaint charging appellants with violations of the narcotics laws on the basis of their actions thus observed in August. The appellants were not arrested in consequence of this alleged offense until March 20, 1963 (Ferguson) and April 25, 1963 (Hardy). They were tried on August 19, 1963.

This sequence of events constituted a denial of the speedy trial to which appellants are entitled under the Sixth Amendment and their convictions constituted a deprivation of liberty without the due process to which they are entitled under the Fifth Amendment. The Government's unconscionable delay in notifying appellants of their alleged offenses was done deliberately for the Government's own purposes — so as to keep its agents "under cover" - and prejudiced appellants by diminishing or destroying their ability to prepare a defense. They were able only to deny the Government's evidence, without the circumstantial detail that might have been available had they been given reasonably prompt notice of the charges against them. The appellants' fundamental right to defend against criminal charges was thus impaired for the Government's convenience. Their trial was not a fair one.

No part of the delay in bringing appellants' case to trial was attributable to them. They did not waive their right to a speedy trial; it was expressly asserted in motions both before and at the trial.

In consequence, the judgments of conviction must be reversed and vacated with directions to dismiss the indictments.

Failing disposition of this appeal on the foregoing grounds, there are two reasons why new trials should be granted:

3) The trial court prejudiced appellants when it refused to charge the jury that the evidence against them adduced by a paid informer should be received and weighed with great care and caution. The word of an informer who lives on a dole the amount and frequency of which are determined in the sole discretion of the police cannot be considered of equal weight with the word of an ordinary citizen. A professional betrayer is a tainted creature, particularly when, as here, he is also an ex-convict and a former user of narcotics. Defendants whose liberty is at stake are entitled to have this taint pointed out to the jury by an impartial judge. When the judge refuses to do so, leaving the matter to the partial arguments of counsel, such defendants have been unduly and unfairly prejudiced.

4) When one of the chief government witnesses against appellants disclosed in direct testimony that the appellant Hardy had been previously convicted of a penitentiary offense, Hardy was obviously prejudiced in the eyes of the jury; and the trial court erred in denying a consequent motion for a mistrial.

ARGUMENT

I.

THE GOVERNMENT'S DELIBERATE DELAY IN INFORMING APPELLANTS OF THEIR ALLEGED OFFENSES DEPRIVED THEM OF A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT

With respect to Point I, appellants desire the Court to read the following pages of the reporter's transcript: Tr. 3-5, 19-21, 27-53, 55, 57-78, 81, 95-117 (as summarized in the Statement of the Case, supra, pp. 2-6).

The facts of this case place squarely before the Court the question whether the deliberate and purposeful delay by the Government in initiating appellants' prosecution deprived them of a speedy trial as that term is used in the Sixth Amendment.[1/] This question cannot be answered in this case or any other without careful examination of the facts, for "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Beavers v. Haubert, 198 U.S. 77, 87 (1905); Stevenson v. United States, 107 U. S. App. D. C. 398, 399, 278 F. 2d 278, 279 (1960).

Before considering the peculiar circumstances of this case, however, it would appear essential as a matter of candor to advert to certain language used by this Court in Nickens v. United States, No. 17735, decided September 19, 1963. In that case, the facts of which are in certain respects not dissimilar to those of the present appeal, this Court said:

1/ Dismissal of the indictments under Rule 48(b) of the Federal Rules of Criminal Procedure is not discussed separately in this brief because the Rule merely provides a means for implementing the command of the Sixth Amendment. A failure to dismiss in circumstances that violated the Amendment would obviously constitute an abuse of discretion under the Rule.

> ". . . the delay between the date of the offense and the commencement of criminal prosecution is not covered by . . . the Sixth Amendment . . ." (p. 3, slip opinion).

If that language were a correct statement of the law of this jurisdiction, the present appeal would fail, to the extent that it is based on the Sixth Amendment. Appellants respectfully submit, however, that this statement is not correct, and that it does not constitute a precedent that need be or should be followed by this Court in the present case.

In the first place, the quoted language was not necessary to the decision, as is fully demonstrated by the concurring opinion of Judge Wright in the same case. The affirmance of Nickens, in the circumstances of that case, is entirely consistent with the view that the Sixth Amendment forbids excessive delays by the Government before complaint and arrest as well as after (see especially concurring opinion at p. 6).

In the second place, the quoted language from the Nickens case depends upon an exceedingly frail chain of authority. The gravity of the question as a matter of constitutional law is such as to warrant some analysis of that authority. The only case cited by the Court in the Nickens case to buttress its quoted statment is Harlow v. United States, 301 F. 2d 361, 366 (5th Cir. 1962), cert. denied, 371 U. S. 814 (1962). Harlow does contain language to that effect; but, as in Nickens itself, a special concurrence (by Judge Rives, casting doubt on the soundness of that language) shows that it was not necessary to the decision, since "there was no unnecessary and unreasonable delay at any stage, either before the prosecution was instituted or afterward" (id. at 375). In turn, the only case cited by the court in the Harlow case to support its

obiter statement is Hoopengarner v. United States, 270 F. 2d 465 (6th Cir. 1959). Hoopengarner, in its turn, cites only D'Aquino v. United States, 192 F. 2d 338, 350 (9th Cir. 1951), cert. denied, 343 U. S. 935 (1952), for this proposition of law; and D'Aquino cites — nothing.

There are to be sure, other apparent authorities for the proposition that the "speedy trial" command of the Sixth Amendment protects only those who have already been indicted or arrested or otherwise apprised of the charges against them. But analysis discloses that these authorities are worth no more than those already discussed. The editors of the respected Columbia Law Review, for example, state that "In no event . . . will the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this" (Vol. 57, p. 848). But the two decisions they cite for this sweeping and categorical statement do not bear it out in any respect: one[1/] involved a trivial delay of 16 days in apprising the defendant of a traffic violation detected by photographic means; and the other[2/] was a case in which the defendants' claim was waived by failure to assert it in the trial court and where, moreover, there was no showing that the delay arose from deliberate and purposeful governmental action.

Other decisions frequently cited for the same proposition are equally distinguishable on similar grounds. In Foley v. United States, 290 F. 2d 562 (8th Cir. 1961), for example, the court found the Government's delay before indictment not unreasonable[3/] and said

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1/ People v. Hildebrandt, 204 Misc. 1116, 129 N. Y. S. 2d 48 (County Court 1954).
2/ People v. Jordan, 45 Cal. 2d 697, 290 P. 2d 484 (1955).
3/ There were 130 government witnesses, plus stipulated testimony of 58 others. See 290 F. 2d at 564.

"There is no evidence of intentional or vexatious delay on the part of the Government . . ." (id. at 566). And in Venus v. United States, 287 F. 2d 304 (9th Cir. 1960), reversed, 368 U. S. 345 (1961), likewise, there was no showing whatever that the delay was attributable to the Government.

It would appear, therefore, that the doctrine of these cases is one that lies in repetition only, not in law. With deference, appellants submit that this edifice of supposed authority cannot stand. Court is parroted by court, but none can say why the rule is so. It is a rule of judicial convenience, serving as a substitute for, rather than an expression of, thought. It has been used time and again as an easy justification of results that could have been otherwise justified by diligent recourse to other rules. In short, it is not a rule that this Court can with propriety rely upon in adopting a position on an issue of great constitutional moment.

What this Court can do with propriety, and should do, is adopt once and for all the view it has already expressed concerning the applicability of the Sixth Amendment to pre-arrest delays and then consider the facts of this case in relation to that view. This Court's clearest expression of that view, admittedly obiter, appears in footnote 4 appended to its opinion in Mann v. United States, 113 U. S. App. D. C. 27, 29-30, 304 F. 2d 394, 396-397 (1962), cert. denied, 371 U. S. 896 (1962):

> "While the point is not important here, we note that in our view, and contrary to some recent opinion [citing the Foley and Venus cases already discussed above] the constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Provoo, infra, seems to have settled the point. See also our opinion in Taylor, infra.
>
> In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of the constitutional right, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive,' Pollard v. United States, 352 U. S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393, even an indictment within the limitation period may come too late to square with the Sixth Amendment."

As this language indicates, indeed, this question has already been determined by the Supreme Court's affirmance per curiam (350 U. S. 857 (1955)) of Petition of Provoo, 17 F. R. D. 183 (D. Md. 1955). It is no doubt correct to say that much of the delay found objectionable in the Provoo case occurred after indictment; but it is likewise incontestable that the government-induced delay before the filing of charges bulked as important in the view of the court as the later delays. See findings of fact, 17 F. R. D. at 195, conclusions of law, id. at 203. A comparable combination of delays was held by this Court to vitiate a conviction in Taylor v. United States, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956).

There is nothing new in the concept that common justice, to which all courts are dedicated irrespective of constitutional provisions, requires the dismissal of criminal actions that have too long been kept from the knowledge of the defendant. In 1765, long before the Sixth Amendment was adopted, Lord Mansfield denied a motion for a criminal information that had been long delayed without explanation. Such delay, he said, is one of the ways "by which the Court has limited itself" in determing criminal matters notwithstanding the "Statute [of limitations] made, to limit it." King v. Robinson, 1 W. Bl. 541, 542, 96 Eng. Rep. 313 (K. B.). And in Queen v. Robins, 1 Cox Crim. Cas. 114 (1844), Baron Alderson, sitting as a judge of assizes, directed a verdict of acquittal without hearing the evidence in the case of a criminal defendant against whom a complaint had issued somewhat less than two years after the offense, the delay being unexplained. In so doing the court used these memorable words:

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servents and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

Appellants submit that these beneficent principles, as embodied in the Sixth Amendment, should be recognized by this Court. The circumstances of this case demonstrate that, for each appellant, it has been

"very unjust to put him on his trial."

Appellants were tried almost exactly a year after commission of the alleged offenses upon which their indictments were based. This year consisted of seven to eight months between commission of the alleged offense and arrest of the appellants, and four to five months thereafter until trial. The latter delay may not have been in itself excessive; the former, however, is neither excused nor excusable. Together they form a gross period so lengthy as to deprive appellants of their constitutional right to a speedy trial in the circumstances of this case.

Here there was no delay occasioned by the need to discover and marshal evidence or to piece a case together through a multitude of witnesses, as in Foley v. United States, supra; here the Government's case was completed in half an hour on the very evening appellants were approached by the policeman. There was no effort to keep appellants under surveillance to establish a pattern of activity or to trace to the source the narcotics they were allegedly selling. The Government left them altogether alone as respects this charge from August of 1962 to March of 1963. Not a moment of delay in bringing the case to trial was attributable to appellants (cf. Tr. 3-5), as there was in Nickens v. United States, supra. Appellants did not waive their right to a speedy trial, as was done in People v. Jordan, supra; on the contrary, they clearly asserted it both at the trial and theretofore (Tr. 3-5, 95-98; Hardy R. 6). Appellants did not admit that the occurrence on which their conviction was based ever took place, as the appellant did in Nickens; here Ferguson

flatly denied the Government's evidence (Tr. 112-115) and Hardy did not testify. Consequently the Government did not, and could not, prove that its delay caused no prejudice, as it did in Nickens. Here there is substantial evidence that the memories of the Government witnesses had lapsed or faded (see Statement of the Case, supra, p. 5) whereas there was none in Nickens (see concurrence of Judge Wright at p. 11 of slip opinion).

Here the Government's delay in apprehending Ferguson and Hardy was "purposeful" as that term was used by the Supreme Court in Pollard v. United States, 352 U. S. 354, 361-362 (1957). It was not "oppressive" in the sense that it was directed against appellants in hatred or vengeance but it clearly was the product of "the deliberate act of the government," which the Pollard case condemns alike with oppression. Here the Government kept its information about Ferguson and Hardy to itself for the sole purpose of permitting its agents to remain "under cover" in order that they might pick up other supposed narcotics offenders (see Tr. 100-101).

The Government's delay would at first glance appear to have been for a laudable purpose and in the public interest. Even so, it had the effect of making Ferguson and Hardy, without their consent, or even knowledge, bear the burden of upholding the public interest. It may be doubted that two indigents should thus be forced unwittingly to carry such a weight. But what is "the public interest"? It can scarcely be asserted that the public interest is ever truly served when action or inaction in the name of the public prejudices one or two unsuspecting members of that public and results in a deprivation of their liberty. The Sixth Amendment

was adopted for the protection of the public itself as well as for individual defendants. See United States v. Sorrentino, 175 F. 2d 721, 722 (3d Cir. 1949), cert. denied, 338 U. S. 868 (1949).

It is not as if the course the Government took had been the only one available to it as a means of stopping the narcotics traffic — it was merely the easy way. Consider that the policeman whose evidence convicted appellants — and who was kept "under cover" to their prejudice — had been a construction worker a mere six weeks before he began his law enforcement work (Tr. 19, 27, 28). He received virtually no training in police work (Tr. 27-29). He was not a product of the Police Academy or the F.B.I.; he was not a criminologist or a sociologist or a narcotics expert; he was merely an ordinary citizen who happened to change jobs. The public would not be measurably inconvenienced by hiring a few others like him. Such men are not unique. And, moreover, he could easily have testified before the Grand Jury soon after the occurrence of the alleged crime without public disclosure of his work.

In short, the Government forebore to apprehend Ferguson and Hardy for its own convenience. It might have been inconvenienced, nothing more, had it chosen to bring its operative from under his "cover." Moreover, there is no evidence whatever that if appellants had been arrested a day or a week after this offense that all participants in the narcotics underworld would thereafter necessarily have known all about the identity of the policeman and his informer. That is a possibility perhaps; but it is by no means a certainty. In this case, then, the prosecuting authorities have harmed the appellants for their own advantage. This they cannot be permitted to do. The harm done these appellants, if not corrected by this

Court, can be translated into a license of potential menace to all citizens.

No prejudice to appellants need be shown to support the dismissal of their indictments on Sixth Amendment grounds. Taylor v. United States, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956). The burden, instead, is on the Government to establish that no prejudice in fact resulted from its delay. Williams v. United States, 102 U. S. App. D. C. 51, 53, 250 F. 2d 19, 21 (1951). The Government has not sustained that burden here. It did not even try. On the contrary, as shown above, appellant Ferguson's denial of the Government's evidence, and the faded memories of the witnesses who gave that evidence, demonstrate the actual prejudice that appellants suffered. The reasons why their convictions must therefore be overturned were eloquently summarized by Judge Wright in the Nickens case, supra:

> "The danger of grave injustice is magnified in a case such as this where the identification is predicated on a single sale, and where, as is customary, the Government uses an addict as its informant. Since the possibility of abuse of the Government's control over the evidence exists, the court must remain vigilant to scrutinize delay, for "[t]he preservation of the purity of its own temple belongs only to the court" [footnote omitted] (slip opinion p. 10).
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> * * * * *
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> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. [footnote omitted] If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors"(slip opinion p. 8).

For these reasons the judgments below should be reversed, with directions to vacate the convictions and dismiss the indictments.

II.

THE GOVERNMENT'S DELIBERATE DELAY IN INFORMING APPELLANTS OF THEIR ALLEGED OFFENSES CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FIFTH AMENDMENT

With respect to Point II, appellants desire the Court to read the same portions of the reporter's transcript listed under Point I.

Even though this Court should determine that the Sixth Amendment does not protect citizens from deliberate and purposeful forbearance by the Government to apprise them of offenses within the Government's exclusive knowledge, that conduct cannot be squared with the due process requirement of the Fifth Amendment.[1/]

"Due process," as applied to criminal trials, is first and foremost an admonition that trials must be fair. Failure to accord a fair trial violates "even the minimal standards of due process." Irvin v. Dowd, 366 U. S. 717, 722 (1961). Unfairness may manifest itself in any of numerous ways; there is no inclusive catalogue of possible infringements. It is for the courts to determine whether the circumstances surrounding a particular trial are such as to have made it unfair to those condemned to punishment thereby. The question is whether some act or omission of the prosecuting authorities offends the sense of justice, the "concept of ordered liberty"[2/] that lies behind the Bill of Rights. If so, it is immaterial what form the injustice takes. In an important case decided earlier this year, Gideon v. Wainright, 372 U. S. 335, the Supreme Court held that "due process" as used in the Fourteenth Amendment includes the requirement that an accused, even in a non-capital case, be accorded the assistance of counsel. This holding was based on the Court's

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1/ Objection to the Government's conduct on due process grounds was made below. Tr. 97.

2/ Mr. Justice Cardozo in Palko v. Connecticut, 302 U. S. 319, 325 (1937).

determination that the right to counsel is one both "fundamental and essential to a fair trial." 372 U. S. at 342.

If the right to counsel in a non-capital case is so fundamental that its denial is a denial of due process under the Fourteenth Amendment, surely the denial of speedy justice that took place in this case is likewise a denial of due process under the Fifth.1/ Indeed the right to speedy justice has been much longer settled than the right to counsel. Purely historical justification for the latter is at best inconclusive;2/ but the right to speedy justice is as clear and as old and as fundamental as Magna Charta:

> "To no one will we sell, to no one deny or delay, right or justice."3/

The United States Attorney is the inheritor of King John's justiciars in the sense that he will be tempted to "delay justice" for his own purposes if he be not stopped by command of the basic law. And the Fifth Amendment is the child of the Great Charter in the sense that it is the modern expression of ancient right, of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" Powell v. Alabama, 287 U. S. 45, 67 (1932).

There is no need to rehearse at this point the facts of this case, already discussed, that demonstrate the unfairness of the treatment appellants were accorded by their Government. It is sufficient here to point out that the Government's protracted and unexcused delay in letting appellants know they were to be charged with crime inevitably weakened, perhaps destroyed,

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1/ The meaning of "due process" under the two amendments is of course identical. Cf. Hibben v. Smith, 191 U. S. 310, 325 (1903).

2/ For a discussion of the right to counsel as a matter of history see Betts v. Brady, 316 U. S. 455, 465-471 (1942), overruled by Gideon, supra.

3/ As quoted in Petition of Provoo, supra, 17 F. R. D. at 196.

their ability to defend themselves. There is hardly any human right more "fundamental" than the right to defend oneself against a criminal charge. That is why we have courts. When the means of preparing an adequate defense to a criminal charge are impaired or destroyed, as here, the unfairness of a trial and conviction based on that charge is manifest. In Gideon v. Wainright, supra, the Court upheld the right to counsel as of the essence of due process because without counsel an accused cannot adequately prepare his defense. See especially 372 U. S. at 344-345. The reason for requiring a speedy trial is obviously identical; and this case is therefore indistinguishable in principle from Gideon.

Here justice has been delayed — and therefore denied — to appellants by the Government's deliberate act, consciously adopted as a means of apprehending others and thus without relation to appellants' offenses. This is the antithesis of due process. It is process that is "due" only when and to the extent that it suits the Government's plans for law enforcement. Appellants' rights have been subordinated or, more accurately, disregarded because those rights happened to conflict with the prosecutor's desire to prosecute others. The Government's course of action is one that this Court cannot tolerate.

III.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO REGARD WITH CAUTION THE TESTIMONY OF "SPECIAL EMPLOYEE" ATRIA HARRIS, THE PAID INFORMER.

With respect to Point III, appellants desire the Court to read the following pages of the reporter's transcript: Tr. 59-79, 118, 159-161.

Should this Court decline to dispose of this appeal on the grounds stated above, it should nevertheless order a new trial.

The significant evidence against appellants was furnished by the prosecution through undercover police officer Rufus Moore and "special employee" Atria Harris. Because of the vital nature of the evidence presented by these two witnesses, great care should have been exercised to insure that it was evaluated by the jury in its proper perspective and in the light of the known circumstances relating to those witnesses.

Witness Atria Harris can best be described as a paid informer. According to the testimony (Tr. 60, 75, 77), Atria Harris was not a police officer and was not a regularly assigned employee of the police organization. He was, rather, an informer who was furnished money as a dole in such amounts as the police deemed necessary or desirable in the circumstances (Tr. 77). With this type arrangement the informer is obliged to perform in a manner acceptable in all respects to the police, for they have the ability to control the amount of money he will receive and of course may discontinue his dole entirely. This arrangement, while perhaps useful, is not wholesome.

With respect to credibility and reliability the informer is entirely different from other witnesses. It can be appropriately assumed that ordinary witnesses are upright citizens, whose testimony is entitled to normal weight and credibility. But this is not the case with the informer. Not only is he most anxious to please the police organization, which controls his very existence through his dole, but his character is questionable. In effect he is committing an act of betrayal. Despicable as those betrayed may be, the informer's act casts doubt upon his reliability. He is being paid to betray people with whom he formerly associated. In this case, the informer was also an ex-convict and admittedly had been a narcotics addict in the recent past. It is clear that the testimony of such an individual should not be entitled to the same weight and credibility that would be given the testimony of an ordinary witness. The proper protection of the accused's rights to a fair trial requires that the trial judge specifically caution the jury in this regard. It is not enough that the jury may have been aware of these matters through the arguments of counsel. This specific recognition by the impartial trial judge is essential.

Counsel for defendant Hardy requested the court below to instruct the jury to consider with care and caution the testimony of a paid informer who had been previously convicted of a narcotics offense (Tr. 61), and who had been a narcotics addict (Tr. 118, 159-161). Even the United States Attorney agreed that the defendant would have been entitled to an instruction of that kind (Tr. 160). The court nevertheless denied the request (Tr. 161), explaining that the witness's status as an ex-convict

and as an ex-narcotics addict would not justify or require the granting of such an instruction (Tr. 160). Counsel for the defendant analogized the requested precautionary instructions with respect to evidence introduced by a witness who was also an accomplice to the crime (Tr. 160). Since there was no evidence indicating that the informer was an accomplice, the rule relating to precautionary instructions governing testimony of accomplices was not applied. The court apparently gave no consideration to the wisdom or necessity, in the interest of justice, for an instruction of this kind, where a paid informer is involved.

Because of the extensive use of paid informers in this area for the apprehension of violators of the narcotics laws, and the testimony which necessarily follows therefrom, it is important that the courts adhere to a consistent and fair rule regarding their testimony.

In Fletcher v. United States, 81 U. S. App. D. C. 306, 307, 158 F. 2d 321, 322, (1946), this Court said that:

> "The rule in this jurisdiction for a quarter of a century has been to require that a jury be warned in the case of evidence given by a detective engaged in the business of spying for hire."

This rule was applied with respect to a paid informer in the Fletcher case, which was reversed and remanded for a new trial. The failure to grant the precautionary instruction was the sole ground for reversal. In arriving at its conclusion this Court took particular notice of the status of the informer as an addict and peddler, and that he had been previously convicted and sentenced for violating the narcotics laws [81 U. S. App. D. C. at 307, 158 F. 2d at 322].

The principal difference between the circumstances of the Fletcher case and the instant case is that the police officer who testified in Fletcher was not in a position to corroborate much of the informer's testimony, while this is not so here. In a later decision which dealt with the testimony of an informer in a narcotics case, whose testimony was corroborated, this Court discussed the holding in Fletcher but declined to reverse the lower court because no request for an instruction had been made. Cratty v. United States, 82 U. S. App. D. C. 236, 163 F. 2d 844 (1947). The Court, referring to its rule with respect to testimony of accomplices, stated [82 U. S App. D. C. at 242, 163 F. 2d at 850]:

> "Likewise concerning the testimony of an informer we comment now that the trial court would be well advised to caution the jury as to its dependability, but we are again obliged to rule that in the absence of a request for an instruction on this subject there is no reversible error."

Here there was a specific and clear request for an instruction, which was denied. The failure to grant the requested instruction is reversible error.

In the fair administration of justice, it is not appropriate to permit the jury to make its own assessment of the weight and reliance to be placed upon testimony of informers. The very nature of the acts of such individuals in ensnaring unwitting persons of their own kind is such an indication of lack of character and reliability as to demand a precautionary instruction to the jury. In the circumstances of this case, the additional known proclivities of the witness toward narcotics and his past criminal record add to the necessity for the requested instruction.

In the instant case, the court granted a general instruction as follows (Tr. 149-150):

> "Secondly, you exercise the exclusive function of passing upon the credibility of the witnesses. Now you can see that this is a very important function, because to determine where the truth lies you must of necessity decide who is telling the truth. How you are to do that is left to your own determination as persons possessing common sense and human experience.
>
> "Among other things, in determining the credibility of a witness, the jury may consider his manner and demeanor on the witness stand, his interests, prejudice or bias, if any, whether he has a purpose to serve which might color his testimony, his means of knowing what he has testified to, the probability or improbability of his testimony, the consistency or inconsistency of his statements, the reasonableness or unreasonableness of his testimony viewed in the light of all the circumstances surrounding that testimony, including whether or not he has been contradicted by other credible evidence, and whether or not he has made statements at other times and places contrary to those made on the witness stand.
>
> * * * * *
>
> "The credibility of the witnesses and the weight of their evidence are solely matters for your determination. The court cannot help you in this. You are the exclusive judges in determining where the truth lies."

These broad, general instructions are not adequate to guide the jury in its assessment of the evidence. The court's refusal to grant a specific precautionary instruction with respect to witness Atria Harris resulted in undue prejudice to appellants, denied them a fair trial and was accordingly reversible error. Fletcher v. United States, supra; Cratty v. United States, supra.

IV.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL UPON THE INTRODUCTION BY THE GOVERNMENT OF EVIDENCE THAT APPELLANT HARDY HAD BEEN CONVICTED OF A PRIOR OFFENSE UNRELATED TO THE OFFENSE CHARGED.

With respect to Point IV, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 62, 63, 110, 111, 118, 121-123.

The rights of appellant Hardy were seriously prejudiced by the Government's introduction, on direct examination of its own witness, of evidence that the accused had been convicted of a prior offense not related to the crime for which he was then being tried. Specifically the prosecutor asked the Government's witness, special employee Atria Harris, whether he had "seen Hardy at any time prior to August 27, 1962" (Tr. 62-63). The witness replied that he had; and when asked by the prosecutor "When?" he replied, "We had did time in the penitentiary together" (Tr. 63). This is the only evidence of Hardy's prior conviction in the record; he did not take the stand and hence was not open to impeachment.

At a later stage of the hearing the court denied a motion for a mistrial after having been assured by the prosecutor that when the above question was asked he did not "know the answer was going to be as it was" (Tr. 111).

It is a well settled rule that it is ordinarily reversible error for the trial court to admit evidence of an offense other than the one before it. Hansford v. United States, 112 U. S. App. D. C. 359, 365, 303 F. 2d 219, 225 (1962); Harper v. United States, 99 U. S. App. D. C. 324, 239 F. 2d 945 (1956). The reason for the rule is that an accused is

entitled to be tried on the basis of the facts relevant and material to the particular crime he is alleged to have committed without having that evidence colored, or the jury influenced, by any other offenses not directly bearing upon the crime involved. One principal danger of permitting such evidence to come before the jury is that it tends to assume undue prominence in the jury's thinking as compared with the evidence relating to the specific offense charged. Mr. Justice Jackson, speaking for the Court in Michelson v. United States, 335 U. S. 469, 475-476 (1948), made this clear when he said:

> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [subject to some qualifications cited in a footnote to the opinion] The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

There are many well established exceptions to the rule, but this case fits none of them. In Fairbanks v. United States, 96 U. S. App. D. C. 345, 347, 226 F. 2d 251, 253 (1955), this Court discussed the exceptions as follows:

> "This Court has admitted evidence of other criminal acts when those acts (1) are so blended or connected with the one on trial that proof of one incidentally involves the other, (2) they explain the circumstances of

> the offense charged, or (3) they tend logically to prove any element of that offense. (There are other exceptions to the general rule not here relevant)."

Such exceptions are based upon practical recognition that certain other offenses may be so inextricably interwoven with the crime charged that their relevancy as evidence of the crime charged outweighs the prejudice that would occur. Such relevant facts generally involve evidence tending to prove intent, motive, scheme or identity. Martin v. United States, 75 U. S. App. D. C. 399, 127 F. 2d 865 (1942). There is no hint of such a relation between Hardy's prior conviction and the crime of which he was convicted below.[1/]

In a further explanation of the rule and its exceptions this Court (in Harper v. United States, supra,) has analyzed it into its basic elements in the following manner:

> Thus analyzed, the rule is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it, but otherwise inadmissible. [99 U.S. App. D.C. at 325, 239 F. 2d at 946]

It is thus clear that the rule requires the exclusion of the evidence introduced by the prosecution as part of its direct case which informed the jury of the past criminal record of appellant Hardy. The disclosure by witness Atria Harris of Hardy's previous penitentiary term does not come within any of the established exceptions to the rule; nor is it justified when analyzed in the light of the criteria from which these exceptions arise.

1/ In fact the record indicates that appellant Hardy's prior conviction may have been for a crime (petty larceny) entirely unrelated to narcotics (Tr. 122).

It has no relevancy, nor was any claim of relevancy asserted by the prosecution.

The mere statement of witness Atria Harris in the jury's presence was prejudicial and denied defendant Hardy a fair trial. That it could have had, and probably did have, a substantial effect on the jury can be readily seen when the facts of this case are considered. First, the evidence upon which Hardy was convicted amounted simply to statements of an inexperienced police officer and a "special employee," made long after the fact. The evidence is not conclusive that appellant Hardy was anything more than an agent of the buyer in the transaction. And, finally, the evidence is tenuous and strained, to say the least, as it relates to the cumbersome and roundabout handling of the monies and the capsules through Hardy, the third party (as they all stood together) without any explanation of why it was handled in such fashion. In the face of this inconclusive evidence it is inescapable that the disclosure of a previous conviction probably had a major part in inducing the guilty verdict.

But even if the evidence of Hardy's guilt were substantial, it cannot be said that the cold fact of previous incarceration did not have a substantial influence on the jury in rendering its verdict. Leigh v. United States, 113 U. S. App. D. C. 390, 308 F. 2d 345 (1962), cert. denied, 373 U. S. 945 (1963). In the Leigh case the prosecution introduced, for the purpose of comparing the handwriting of the accused, an exhibit on which the defendant had written that he had been arrested in three other states for "checks." The forgery conviction was reversed and remanded for new trial even though it was not clear whether the jury had actually seen

the document, and even though this Court said "Certain it is that evidence of his guilt, even without the card, was substantial and might very well have caused the jury to bring in a verdict of guilty . . ." 113 U. S. App. D. C. at 391, 308 F. 2d at 346. Hardy's case is much stronger than Leigh's : In the first place, evidence of a conviction is weightier than that of mere arrests. Secondly, the prejudicial evidence against Leigh was introduced for a legitimate purpose directly related to the crime for which he was tried; here it was simply an accident bearing no relation to the case at bar. Prejudice to a criminal defendant by inadvertence is surely the hardest to bear and the easiest to correct.

In a recent case decided July 25, 1963 (No. 17517), Freeman v. United States, this Court endorsed the principles of the Harper and Fairbanks cases, supra, and reversed and remanded a conviction under the narcotics laws on the ground that evidence of a prior arrest should not have been admitted. The Court there said:

> ". . . despite timely objection, the judge in the presence of the jury, required the prosecutor to bring out that the arresting officer had previously arrested the appellant for a narcotics violation, and that he had ascertained that the appellant was a narcotics addict. Recognizing the prejudice so created, the Government here moved to remand. We think the Government's position is commendable. The appellant did not take the stand, and the questioned evidence thus did not come out in the course of cross-examination for impeachment purposes. Nor did it come within any of the recognized exceptions to the exclusionary rule. It should not have been received."

In the instant case the trial court denied the motion for a mistrial (Tr. 111).[1/] There is some indication that the judge did so because the evidence was not intentionally brought out by the prosecutor, who did not know the witness would reply as he did. The manner in which the damaging testimony was adduced, of course, has no bearing upon its prejudicial effect on the jury — except, perhaps, that an obviously accidental disclosure, as here, might have even greater prejudicial effect on a jury than one induced by guile. The evidence had no relevance to the offense charged and was not an essential or even peripheral part of the proof of any element of the alleged crime. It does not satisfy any of the recognized exceptions to the rule and fails to qualify as an exception under the criteria adopted by this Court for such purpose. It could not be other than prejudicial to Hardy. Hardy's conviction therefore cannot stand.

1/ Even if there had been no such motion, the doctrine of plain error would require reversal. Rule 52(b), Federal Rules of Criminal Procedure; Tatum v. United States, 88 U. S. App. D. C. 386, 388, 190 F. 2d 612, 614 (1951). The improper admission of a prior conviction clearly affects substantial rights. Cf. Fenwick v. United States, 102 U. S. App. D. C. 212, 252 F. 2d 124 (1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments should be reversed, the convictions vacated, and the indictments dismissed. Failing such action by this Court, the judgments should be reversed and new trials ordered.

Respectfully submitted,

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Attorneys for Appellants
by Appointment of this Court

BRIEF FOR APPELLEE

United States Court of Appeals for the District of Columbia Circuit

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No. 18079

CLYDE L. HARDY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 18148

LEROY FERGUSON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Were appellants deprived of their constitutional right to a speedy trial, the pertinent sequence of events being as follows:

August 27, 1962—Offense committed
March 15, 1963—Complaint filed; warrants issued for both appellants
March 20, 1963—Appellant Ferguson arrested
April 26, 1963—Appellant Hardy arrested
May 20, 1963—Appellants indicted
May 24 and 31, 1963—Appellants arraigned; trial date set for July 8, 1963
July 8, 1963—Trial continued to August 19, 1963, because counsel for appellant Hardy was in trial in another case
August 19, 1963—Appellants tried and found guilty by jury

2. Was the passage of time outlined in Question 1, *supra,* so prejudicial to appellants as to constitute a denial of due process of law?

3. Did the trial court commit reversible error in failing to give a cautionary instruction to the jury regarding the testimony of a Government witness, a special employee of the Metropolitan Police Department and former narcotics addict who had a prior narcotics conviction?

4. Did the trial court commit reversible error in failing to declare a mistrial when a Government witness in his direct testimony made a passing reference to the fact that appellant Hardy had previously done time in the penitentiary?

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* Cases chiefly relied on are marked by asterisks.

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OTHER REFERENCES

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United States Court of Appeals for the District of Columbia Circuit

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No. 18079

CLYDE L. HARDY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed on May 20, 1963, Clyde L. Hardy and Leroy Ferguson were charged with violations of the federal narcotics laws.[1] On August 19, 1963, they

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[1] 26 U.S.C. § 4704(a), 26 U.S.C. § 4705(a), 21 U.S.C. § 174.

were tried and found guilty by a jury in the District Court before Judge Wright of this Court, sitting by designation. By judgment and commitment filed on August 21, 1963, Hardy was sentenced to be imprisoned for ten years on count one, five years on count two, and ten years on count three, the sentences to run concurrently. On September 12, 1963, Ferguson received concurrent sentences of five years each on counts one and three and two years on count two.[2] These appeals[3] followed.

The Offense

On Monday evening, August 27, 1962, Rufus Moore and Atria Harris were in the 1200 block of Seventh Street, N. W. Moore was a police officer, a member of the Narcotics Squad of the Metropolitan Police Department working undercover, and Harris was a special employee of the Metropolitan Police. As they were walking north along Seventh Street they were approached by appellant Hardy. Moore had never seen Hardy before and did not know him (Tr. 24, 42, 48), but Atria Harris was acquainted with him and introduced him to Moore as "Buddy Harris" (Tr. 25, 67).[4] Hardy began the conversation (Tr. 57) by asking Moore and Atria Harris if they were "looking"—*i.e.*, in the market to buy narcotics. Upon being advised by Moore that they were, Moore testified, "Hardy then stated that he knew a fellow on H Street, Northeast, and if we would

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[2] The disparity in the sentences received by the two defendants results from the fact that Hardy had a prior narcotics conviction whereas Ferguson did not. Each received the mandatory minimum sentence. See 26 U.S.C. § 7237, 21 U.S.C. § 174.

[3] The appeals were consolidated by order of this Court dated October 15, 1963.

[4] Concerning Hardy's name Atria Harris testified as follows:

> Q. By what name did you know him?
>
> A. Well, I am sure that I knew him then by the same name I know him now, but normally we call him Buddy Harris. (Tr. 63)

Officer Moore did not learn Hardy's true name until a month or so later (Tr. 55).

take him over there he would be able to buy some stuff for me" (Tr. 20; see Tr. 62).

The three men got into Moore's car, which was parked nearby, and drove to the 700 block of H Street, N. E. Moore parked the car at Hardy's direction, and the two of them got out, leaving Atria Harris sitting in the front seat (Tr. 20-21, 70). Hardy asked Moore how many "things"—*i.e.*, how many capsules—he wanted to buy, and Moore replied that he wanted six and gave Hardy $9.00 in Metropolitan Police advance funds. Hardy and Officer Moore began to walk east on H Street, and in front of 721 H Street they met appellant Ferguson. Hardy promptly told Ferguson that Moore wanted six "things" and handed Ferguson the $9.00. Ferguson thereupon reached inside a brown paper bag which he was holding and took out six capsules, each containing a white powder, which he handed to Hardy. Hardy in turn handed them to Moore[5] (Tr. 21, 39-40, 42, 51), and the two of them returned to Moore's car. The two parted company there, and Moore got in his car and drove away with Atria Harris, leaving Hardy standing on the sidewalk (Tr. 65-66, 72-73). As they drove off, they saw Ferguson farther down the street (Tr. 73). At no time did Moore present any written order for the purchase of narcotics as required by statute,[6] and Moore testified that the capsules were not given to him in or from a package bearing a tax stamp (Tr. 21-22).

Later Officer Moore performed a preliminary field test on the contents of one of the six capsules. The test yielded a positive color reaction, whereby he determined that the white powder contained a narcotic drug, "an alkaloid of

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[5] The reason for this roundabout transaction is simply that illicit purveyors of narcotic drugs do not ordinarily sell their wares to strangers for fear that such strangers may be police officers in disguise. Hardy in effect vouched for Moore to Ferguson. As Atria Harris explained:

> He [Hardy] asked Moore how much did he want and Moore told him and then it was a case of whoever they were going to see [Ferguson] would not accept Moore. Hardy wanted to have the money. (Tr. 65)

See also Tr. 44.

[6] 26 U.S.C. § 4705(a).

the opiate group." He then placed all the capsules into an envelope, which he turned over the next day to his superior officer on the Narcotics Squad (Tr. 25-26).

Events between Offense and Trial

The instant case was not the only one in which Officer Moore was involved. For a period of approximately eight months, from July 1962 to March 1963, he conducted a continuing investigation of the narcotics traffic, frequently with the help of Atria Harris, himself a former addict with a prior narcotics conviction (Tr. 61, 77-79). During all this time, of course, Moore remained undercover. Finally on March 14, 1963, the investigation was concluded, and the following day, March 15, Officer Moore appeared before the United States Commissioner and swore out 102 warrants for violations of the narcotics laws (Tr. 43, 48-49, 52, 53, 58-59, 60-61). Two of those warrants named appellants Hardy and Ferguson as violators.

Five days later Ferguson was arrested. He was presented before the United States Commissioner the following morning, March 21, 1963. Having been advised of his rights by the Commissioner, including his right to a preliminary hearing, Ferguson requested a hearing then and there. The Government, however, did not have a necessary witness and asked for a continuance of one week to March 28. Ferguson's attorney was scheduled to be in trial in another case on that date, so both sides agreed on a continuance until April 11. On the continued date a hearing took place before the Commissioner, who after receiving the evidence ordered Ferguson held for the action of the grand jury. Some time thereafter the case was presented to the grand jury, and since the evidence against Ferguson necessarily implicated Hardy as well, an indictment was returned against both appellants on May 20, 1963.

Meanwhile, on April 26 Hardy was arrested on the outstanding warrant and brought before the United States Commissioner. The proceedings there were continued until May 16 with the consent of both parties, and thereafter the case was continued again until May 28. On May 24,

however, Hardy was arraigned in the District Court and entered a plea of not guilty to the indictment, whereupon the proceedings before the Commissioner were dismissed as moot.[7] Ferguson was arraigned and pleaded not guilty on May 31, 1963. The trial was scheduled for July 8, but on that date the trial was continued until August 19, 1963,[8] because counsel for appellant Hardy was in trial in another case. Finally, on August 19, the case came to trial.

On June 21 appellant Hardy filed a motion to dismiss the indictment for lack of a speedy trial. This motion was heard and denied by Judge Walsh of the District Court on July 12. At the beginning of the trial Hardy's counsel renewed it and was joined by counsel for Ferguson. The court took it under submission (Tr. 4-5). After all the Government's evidence was in, the court heard arguments of counsel and denied the motion (Tr. 95-109).

The Trial

Officer Moore and Atria Harris testified as to the details of the crime outlined above. Moore identified the envelope into which he had placed the six capsules after making the preliminary field test (Tr. 22-23, 25-26) and stated that he had turned them over to Detective Brewer of the Narcotics Squad, whom he named as one of his superior officers (Tr. 46). Detective Brewer also identified the envelope and testified that he had performed another preliminary field test on one of the capsules, with the same result as that already obtained by Officer Moore (Tr. 82-83). He then placed the envelope inside another envelope and de-

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7 Information concerning the proceedings against Hardy before the United States Commissioner may be found in the records of Commissioner's Docket 8, Case 310, which are on file in the Office of the Clerk of the District Court, Criminal Division. The Commissioner's papers with regard to Ferguson are part of the record on appeal.

8 The District Court jacket, part of the record on appeal, erroneously lists July 19 as the continued date rather than August 19. This is undoubtedly a typographical error (7-19 instead of 8-19), since the case was tried on August 19, and the case card in the Assignment Commissioner's office contains only the August date.

livered it to the United States chemist, Dr. William P. Butler, who performed a qualitative analysis on the contents of each of the six capsules. His analysis revealed that each capsule contained a mixture of heroin hydrochloride and mannitol (also known as milk sugar) (Tr. 91-92). The envelopes and the capsules were admitted into evidence, and the Government rested.

The court then heard arguments out of the presence of the jury on appellants' motion to dismiss the indictment for lack of a speedy trial. After the denial of the motion but before the jury was recalled, counsel for appellant Hardy moved for a mistrial on the ground that the jury had been indirectly informed that Hardy had a criminal record. Atria Harris in his direct testimony had let this come out in answer to a question from the prosecutor:

> Q. Had you seen Hardy at any time prior to August 27th, 1962?
> A. I had.
> Q. When.
> A. We had did time in the penitentiary together. (Tr. 62-63)

The prosecutor immediately changed the subject, and the matter did not come up again in the testimony. Upon being assured by the prosecutor that he had not expected this answer from Harris, the trial judge denied the motion for a mistrial (Tr. 110-111).

Leroy Ferguson then took the stand and denied that he had ever sold narcotics to either Hardy or Moore on H Street, N. E., or at any other place (Tr. 112). On cross-examination he stated that he had not known his co-defendant until January of 1963, five months after the alleged offense. He conceded, however, that he did know Atria Harris (Tr. 113-114), although he was not sure whether he saw him on August 27, 1962 (Tr. 115). Appellant Hardy did not testify at all and offered no evidence in his own behalf.

After submitting written prayers for instructions, all of which were granted by the court (see Tr. 124), counsel for Hardy orally requested the court to give a cautionary instruction that the testimony of Atria Harris

"should be received with care and caution, since he is a past user of narcotics and does have a prior conviction" (Tr. 118). The court did not rule on this point at that time, but when the charge was later given to the jury it did not include such a cautionary instruction. The court did, however, instruct the jury generally regarding the credibility of witnesses (Tr. 149-150). Counsel for Hardy took exception to the court's failure to give the requested instruction (Tr. 159), but the court suggested that the general instruction was sufficient and declined to say anything further to the jury on the point (Tr. 160-161). The jury retired and brought back a verdict of guilty on all three counts as to each defendant (Tr. 163).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

Title 21, § 174, United States Code, provides:

> **Same; penalty; evidence**
>
> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of

any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Title 26, § 4704(a), United States Code, provides:

General requirement

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, § 4705(a), United States Code, provides:

General requirement

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

The lapse of time between offense and arrest did not operate to deprive appellants of their constitutional right to a speedy trial and did not constitute a denial of due process of law. Although the Supreme Court has not ruled on the point, the courts in at least five circuits, including this one, have held that the Sixth Amendment right to a speedy trial does not arise until prosecution has been initiated by the filing of a formal complaint or charge. Any delay prior to that time is governed only by the applicable statute of limitations. As to the due process question, appellants have failed to make the requisite showing that the delay of a few months was so prejudicial as to amount to a denial of due process of law. All that they assert is that they were unable to remember what they had done on the date of the offense. But appellants cannot avoid prosecution on the ground that they have weak memories. The delay involved in this case was fully justified by the need to keep the identity of the undercover police officer from being revealed. The right to a speedy trial is consistent with such delays and does not preclude the right of society to make reasonable efforts to suppress the illicit traffic in narcotics.

The failure of the trial court to instruct the jury to consider the testimony of a special employee of the Metropolitan Police Department with care and caution is not a valid ground for reversal. It is well established that the giving of such an instruction, while it may be the better practice in most cases, is altogether discretionary with the court. It is never an absolute necessity. Where the testimony of an informant or "decoy" is corroborated by other evidence, as in the instant case, the failure of the court to give a cautionary instruction is not reversible error.

The statement by a witness that he had known one appellant in the penitentiary was not grounds for a mistrial, and the trial court was correct in denying appellant's motion to declare one. While it is true that evidence of a defendant's prior criminal record is not ordinarily admissible

except to impeach his credibility as a witness, there are several recognized exceptions to this rule. When an accused raises the defense of entrapment, as appellant Hardy did here, the prosecution may offer evidence of prior convictions for offenses similar to the one for which he is on trial in order to show predisposition. The record indeed shows that appellant Hardy had a previous conviction for a violation of the narcotics laws. Since this evidence would have been directly admissible, the indirect reference by a witness to appellant's prior imprisonment certainly does not call for the court to declare a mistrial. Moreover, appellant's counsel below believed that he had derived some advantage from the remark by the witness of which appellant now complains and sought to utilize it for his client's benefit in arguing his case to the jury. Under these circumstances appellant cannot now say that the remark was improper.

ARGUMENT

1. Appellants were not denied any constitutional rights

(Tr. 3-5, 19-20, 27-29, 31-33, 43, 48-49, 52, 53, 56, 58-59, 95-109)

a. Speedy Trial

Appellants contend that the lapse of time between offense and arrest—slightly less than seven months for Ferguson, eight months for Hardy—operated to deprive them of their constitutional right to a speedy trial under the Sixth Amendment. The identical argument was advanced (albeit not so zealously, perhaps) by the appellant in *Nickens* v. *United States,* — U.S. App. D.C. —, 323 F.2d 808 (1963), but this Court explicitly held:

> Appellant's claim relating to the delay between the date of the offense and the commencement of criminal prosecution is not covered . . . by the Sixth Amendment, but rather it relates to the running of the applicable statute of limitations. 323 F.2d at 809 (citations omitted).

At the outset of their argument appellants candidly acknowledge the existence of *Nickens* but strive manfully

to distinguish it in a vain effort to demonstrate that it should not be regarded as controlling. But whether appellants like it or not, *Nickens* is the law in this jurisdiction. It is not only applicable to the instant case but completely dispositive of the speedy trial question.

It has been held by Courts of Appeals in at least four other circuits that the right to a speedy trial, as guaranteed by the Sixth Amendment and implemented by Rule 48(b) of the Federal Rules of Criminal Procedure, does not arise until prosecution has been formally begun by the filing of a criminal charge before an appropriate tribunal. *Harlow* v. *United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Foley* v. *United States*, 290 F.2d 562 (8th Cir.), *cert. denied*, 368 U.S. 888 (1961); *Venus* v. *United States*, 287 F.2d 304 (9th Cir. 1960), *rev'd on other grounds*, 368 U.S. 345 (1961); *Hoopengarner* v. *United States*, 270 F.2d 465 (6th Cir. 1959); *Parker* v. *United States*, 252 F.2d 680 (6th Cir.), *cert. denied*, 355 U.S. 964 (1958); *D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 345 U.S. 935 (1952). The rule is most cogently stated in the *Parker* case:[9]

> Appellant appears to argue that his constitutional rights were violated because the Government did not commence its prosecution of him at an earlier period; *but he cannot complain that he was not sooner indicted.* The provisions of the Sixth Amendment guaranteeing a speedy trial to anyone charged with an offense, contemplates [*sic*] a pending charge and not the mere possibility of a criminal charge. 252 F.2d at 681 (emphasis added).

In other words, the Sixth Amendment has no application until after prosecution has been instituted. The distinction which the court makes between a pending charge and the possibility of a charge is a vital one.

> A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the

[9] In *Parker* there was a delay of almost three years between offense and indictment, but the Court of Appeals found no denial of the right to a speedy trial. Cf. NOTE, 57 COLUM. L. REV. 846, 852 n.38 (1957).

> accused and a prosecution initiated. It is true the popular understanding of the term is "accusation," and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusations as have taken shape in a prosecution. In the eyes of the law, a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge. *United States* v. *Patterson,* 150 U.S. 65, 68 (1893).

See *United States* v. *Hanlin,* 29 F.R.D. 481 (W.D. Mo. 1962); *United States* v. *Hoffa,* 205 F.Supp. 710, 721 (S.D. Fla. 1962); cf. *State* v. *Robinson,* 262 Minn. 79, 114 N.W.2d 737, *cert. denied,* 371 U.S. 815 (1962). Before the first formal step is taken in a criminal proceeding against a prospective defendant, the only bar to prosecution is ordinarily[10] the applicable statute of limitations, which in this case runs for five years.[11] See *Nickens* v. *United States, supra* at 810 n.1, last sentence.

Appellants endeavor to show that the holding in *Nickens* "depends upon an exceedingly frail chain of authority" (Brief for Appellants, 12). Without examining all the component links of that chain,[12] appellee would observe that it is not as frail as it may appear. For example, appellants cite a concurring opinion by Judge Rives in *Harlow* v. *United States, supra* at 375, to cast doubt on the holding of the majority in that case. But Judge Rives points out that the holding is indeed supported by several opinions of Courts of Appeals, citing *Foley* v. *United States, supra.* He merely says that the rule is not "well established," as the majority states, because there has been no decision on the point from the Supreme Court. But see *Donnell* v. *United States,* 229 F.2d 560, 567 (5th Cir. 1956)

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[10] But cf. *Nickens* v. *United States, supra* at 810 n.2; see section *b, infra.*

[11] 18 U.S.C. § 3282.

[12] Appellants' brief was evidently written without reference to this Court's amendment of its opinion in *Nickens.* This is, of course, quite understandable, since the brief was filed only a few days after the order of this Court amending the opinion, and that order did not receive wide circulation.

(dissenting opinion of Rives, J.). It may well be true, as appellants suggest, that *D'Aquino* v. *United States, supra,* was the first case ever to hold expressly that the right to a speedy trial arises only after a formal complaint is lodged against an accused. But that does not make it any less authoritative or citable. A chain of authority has to start with one link. It would indeed be helpful if we could always look to precedents as definitive as though they had been handed down on stone tablets from Mount Sinai; but we cannot, and it is foolish and frivolous to argue that we should.

Principal reliance is placed by appellants on three cases: *Mann* v. *United States,* 113 U.S. App. D.C. 27, 29-30 n.4, 304 F.2d 394, 396-397 n.4, *cert. denied,* 371 U.S. 896 (1962); *Taylor* v. *United States,* 99 U.S. App. D.C. 183, 238 F.2d 259 (1956); and *Petition of Provoo,* 17 F.R.D. 183 (D. Md.), *aff'd mem. sub. nom. United States* v. *Provoo,* 350 U.S. 857 (1955). But this Court in *Nickens* placed all three in their proper perspective. First, as to *Mann,* the language quoted by appellants "was obiter dictum in that case, and against the great weight of authority . . . ." 323 F.2d at 810 n.1. It was not only "this Court's clearest expression of that view," as appellants state (Brief for Appellants, 14); it was this Court's *only* expression of that view.[13] Moreover, there is authority from this Court at least as persuasive as *Mann* on this issue. *Taylor* v. *United States, supra* at 186, 238 F.2d at 262 (quoted *infra*); *Green* v. *United States,* 105 U.S. App. D.C. 90, 264 F.2d 376 (1959).[14] "Further, as Judge Wright recognizes in footnote 1 of his concurring opinion, the courts in *Provoo* and *Taylor* did not base dismissal of the indictment on the

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[13] It is a coincidence worth noting that Judge Wright, who wrote the Court's opinion in *Mann* as well as the concurring opinion in *Nickens,* on which appellants also rely heavily, was the same judge who presided at the trial of the instant case in the District Court and who denied appellants' motion to dismiss the indictment for lack of a speedy trial.

[14] In *Green,* docketed as No. 14652 in this Court, the point was argued in the briefs, *q.v.,* but not discussed in the opinion, which was merely a short *per curiam* affirmance.

'pre-arrest' or 'pre-charge' delay but merely considered that period as a factor in aggravation of the delay between charge and trial." *Nickens* v. *United States, supra* at 810 n.1. In *Provoo* there was a delay of more than nine years from offense to indictment. Other factors were involved in the dismissal, including an improper trial in another district, the deaths of certain defense witnesses, and the continued imprisonment of Provoo for more than five years. The *Provoo* case turned solely on its own facts, which were numerous and complex, and cannot be cited as authority here. The same is true of *Taylor,* as this Court took pains to point out:

> We do not rely on the mere lapse of time between the commission of the offense and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above which motivates our decision. We do not wish to be understood to do other than apply the rule stated [the right to speedy trial] to the facts and circumstances of this particular case. 99 U.S. App. D.C. at 186, 238 F.2d at 262.

The relevant facts in *Nickens* are virtually indistinguishable from those in the instant case. Indeed, such distinctions as may be made operate adversely to appellants. In *Nickens* the time from offense to commencement of prosecution was almost eight months; here it was less than seven. Nine months elapsed between Nickens' arrest and trial, as compared with only five for Ferguson and four for Hardy. The delay of which Nickens complained included a ninety-day commitment to Saint Elizabeths Hospital for a mental examination and a trial which ended in a hung jury, factors not present in the case at bar. There were four continuances in Nickens' trial; here there was only one.[15] In *Nickens* the investigating officer concluded

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[15] Appellants assert (Brief for Appellants, 17) that none of the delay in bringing the case to trial was attributable to them. The record reflects otherwise; see text accompanying footnote 8, *supra.* Appellant Hardy was ably represented at trial by Robert C. Maynard, Esq. Prior to trial, however, his counsel of record was Mr. Maynard's associate, Mr. Bowers. (See, *e.g.*, Tr.

his investigation and left town two months before initiating prosecution by filing a complaint, a factor which properly caused Judge Wright to express concern in his concurring opinion, 323 F.2d at 814. Officer Moore, however, completed his assigned task on March 14 and swore out arrest warrants for appellants on March 15. Despite all these delays, this Court affirmed Nickens' conviction; *a fortiori* it should also affirm here.

b. Due Process

The Fifth Amendment to the Constitution extends to all persons accused of crimes the protection of due process of law. Appellants now contend that the seven months' delay in bringing them before the bar of justice was, independently of their Sixth Amendment right to a speedy trial, so reprehensible as to constitute a denial of due process. Their argument is earnest and vehement but not convincing.

> As applied to a criminal trial, denial of due process is a failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

Appellants' contention must fail, for they have not made the necessary showing.[16] Cf. *United States ex rel. Birch* v. *Fay*, 190 F. Supp. 105 (S.D.N.Y. 1961).

56.) Mr. Maynard evidently was unaware of the reason for the continuance from July 8 to August 19, for the record reveals that he was mistaken when he told the court (Tr. 3-4) that the case had been continued because all the criminal courts were in trial. There is nothing to show that Mr. Bowers actually requested the case to be continued, and appellee does not suggest that he did. The record is clear, however, that the continuance was granted only because of Mr. Bowers' unavailability to go forward on July 8.

[16] Appellants rely principally on *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) in support of their position. But that case deals with the right of an accused to be represented by counsel, not with any claimed right to a super-speedy prosecution such as that advanced by appellants here. Appellee fails to see the connection.

It has been generally held that where a lapse of time is claimed to result in a denial of due process, the party advancing such claim must show that he has been unduly prejudiced by the delay.[17] *United States ex rel. Von Cseh* v. *Fay,* 313 F.2d 620 (2d Cir. 1963); *Petition of Sawyer,* 229 F.2d 805 (7th Cir.), *cert. denied sub nom. Sawyer* v. *Barczak,* 351 U.S. 966 (1956); *Germany* v. *Hudspeth,* 209 F.2d 15 (10th Cir.), *cert. denied,* 347 U.S. 946 (1954); *New York ex rel. Gwynn* v. *Fay,* 215 F. Supp. 653 (S.D.N.Y. 1963); *Gordon* v. *Overlade,* 143 F. Supp. 577 (N.D. Ind. 1956). The only ground on which appellants base their argument is the assertion that they could not remember at their trial what they had done on the date of the offense. But appellants cannot avoid prosecution because their memories are poor, nor can they impose upon the Government the burden of demonstrating that their recollection is clearer than they say it is. The short delay between offense and charge was fully justified by the necessity of withholding the identity of Officer Moore in order that he might complete his investigation. When he did so, he promptly went before the United States Commissioner and filed the necessary papers. The case involving Hardy and Ferguson appears to have been one of the first in which Officer Moore was involved[18] (Tr. 19-20, 27-29, 31-33), but that is no reason for this Court to throw out their convictions. The need to continue such investigations as that made by Officer Moore over long periods of time has been amply demonstrated in this (Tr. 100-105) and other cases.

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17 A showing of prejudice appears to be unnecessary when an accused relies on the Sixth Amendment rather than the Fifth. *United States* v. *Lustman,* 258 F.2d 475 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958); see *Williams* v. *United States,* 102 U.S. App. D.C. 51, 250 F.2d 19 (1957).

18 Appellants make much of the fact that Officer Moore was a new recruit on the police force and had no prior experience as a law enforcement officer or "a criminologist or a sociologist or a narcotics expert" (Brief for Appellants, 19). But this is totally irrelevant here. The nature and extent of Officer Moore's prior experience are merely factors affecting his credibility, which of course is a matter solely within the province of the jury. As far as the issues before this Court are concerned, it makes no difference whether Rufus Moore was formerly a construction worker or a bank president.

The courts must also consider the vital interest of society in suppressing the traffic in narcotics.

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. *Beavers* v. *Haubert,* 198 U.S. 77, 87 (1905).

See *Stevenson* v. *United States,* 107 U.S. App. D.C. 398, 278 F.2d 278 (1960); *Gorko* v. *Commanding Officer, Second Air Force,* 314 F.2d 858 (10th Cir. 1963); *United States* v. *Graham,* 289 F.2d 352 (7th Cir. 1961); *Fouts* v. *United States,* 253 F.2d 215 (6th Cir. 1958); cf. *United States* v. *Palermo,* 27 F.R.D. 395 (S.D.N.Y. 1961). As the Supreme Court has said in another context, "While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States,* 360 U.S. 1, 10 (1959).

A motion to dismiss an indictment for lack of a speedy trial is addressed to the sound discretion of the trial court. Absent a showing of abuse of that discretion—*i.e.*, "action which is arbitrary, fanciful, or clearly unreasonable"—the court's ruling cannot be disturbed on appeal. *United States* v. *McWilliams,* 82 U.S. App. D.C. 259, 261, 163 F.2d 695, 697 (1947); see *United States* v. *Research Foundation, Inc.,* 155 F.Supp. 650 (S.D.N.Y. 1957). It may be that a substantially longer delay might have been "so oppressive as to constitute a denial of due process." *Nickens* v. *United States, supra* at 810 n.2; cf. *Petition of Provoo, supra.* But that question is not before the Court. On the record in this case appellants have not made and cannot make an adequate showing that they were denied due process of law.

2. The trial court did not err in failing to give a cautionary instruction regarding the testimony of Atria Harris

(Tr. 59-61, 75-79, 118, 149-150, 159-161.)

Atria Harris, a special employee of the Metropolitan Police, testified concerning some of the events of August 27, 1962. On the witness stand he admitted that he had formerly been addicted to narcotics and was once convicted of a narcotics offense. Counsel for appellant Hardy requested an instruction that Harris' testimony "should be received with care and caution" because of his background (Tr. 118), but the court gave only a general instruction on the credibility of witnesses. Counsel excepted, but the court declined to give the requested instruction (Tr. 159-161). Appellants now maintain this was reversible error.

It has long been settled that the testimony of an accomplice may be sufficient to support a conviction. While it may be appropriate for courts to caution juries against relying too heavily on the testimony of accomplices and to suggest that they may require some corroboration, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Caminetti* v. *United States,* 242 U.S. 470, 495 (1917). A cautionary instruction "is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary . . . ." *United States* v. *Becker,* 62 F.2d 1007, 1009 (2d Cir. 1933). See *United States* v. *Cianchetti,* 315 F.2d 584 (2d Cir. 1963); *United States* v. *Mercks,* 304 F.2d 771 (4th Cir. 1962); *United States* v. *Dennis,* 183 F.2d 201, 224-225 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951); *Pina* v. *United States,* 165 F.2d 890 (9th Cir. 1948); *Hanks* v. *United States,* 97 F.2d 309 (4th Cir. 1938). Even the Supreme Court has upheld the right of a trial court to refuse to give an accomplice instruction. *Holmgren* v. *United States,* 217 U.S. 509, 523-524 (1910). But Atria Harris was not even an accomplice here. Rather, he falls at best into the category of what Judge Learned Hand designates as "decoys" in *United States* v. *Becker, supra.* "[A] decoy

is not regarded as an accomplice, not having the same motive to fabricate his story." 62 F.2d at 1009. Thus if it is merely a matter within the court's discretion whether or not to give a cautionary instruction regarding the testimony of an accomplice, *a fortiori* such an instruction would not be required but only discretionary in the case of a "decoy" such as Harris. *United States* v. *Pagano,* 207 F.2d 884 (2d Cir. 1953).

Virtually on all fours with the case at bar is *Joseph* v. *United States,* 286 F.2d 468 (5th Cir. 1960), *cert. denied,* 372 U.S. 979 (1963). Joseph and his co-defendant were charged with possession and sale of narcotics. They were convicted primarily on the testimony of an informer who was serving a prison term himself for violation of the narcotics laws of the State of Texas.

> [T]hree narcotic agents testified that Wilson was paid for his services. There was, therefore, ground to suspect his veracity, and the better practice would have been to give a warning instruction. . . . In the present case, no written request for the cautionary instruction was filed. Defendants' counsel first objected to such failure at the conclusion of the court's charge. As has been noted, the convictions were not solely dependent on the uncorroborated testimony of the informer, and the court did give correct general instructions to the jury as to the credibility to be accorded to the witnesses. Under such circumstances, it is settled by decisions of the Supreme Court, and of this Court, that the failure of the court to follow the better practice and give the cautionary instruction is not reversible error. 286 F.2d at 469 (citations omitted).

Here, as in *Joseph,* the testimony of the special employee was corroborated, not only by the testimony of other witnesses, particularly Officer Moore, but by the six capsules of heroin which were introduced into evidence. *Fletcher* v. *United States,* 81 U.S. App. D.C. 306, 158 F.2d 321 (1946), relied on by appellants, is distinguishable. In *Fletcher* the testimony of the paid informant was uncorroborated, and the conviction was reversed because the trial court refused to give a cautionary instruction where

the entire case depended on the informant's testimony with "not a jot or tittle of other evidence." This Court recognized the distinction in *Cratty* v. *United States,* 82 U.S. App. D.C. 236, 242, 163 F.2d 844, 850 (1947), also cited by appellants; cf. *District of Columbia* v. *Clawans,* 300 U.S. 617, 630-631 (1937). Where the informant's testimony is corroborated, the failure of the court to caution the jury regarding his testimony is not reversible error. *Young* v. *United States,* 297 F.2d 593 (9th Cir.), *cert. denied,* 369 U.S. 891 (1962); *Orebo* v. *United States,* 293 F.2d 747 (9th Cir. 1961), *cert. denied sub nom. Gore* v. *United States,* 368 U.S. 958 (1962); *Walker* v. *United States,* 285 F.2d 52 (5th Cir. 1960).

3. The trial court did not err in failing to declare a mistrial because of a remark by Atria Harris regarding Hardy's prior imprisonment

(Tr. 62-63, 110-111, 118, 121-123, 132-134, 138, 139, 157, 165-169)

The final assignment of error relates to appellant Hardy alone. He argues that the court should have declared a mistrial because Atria Harris, in response to a question about his prior acquaintance with appellant, stated that the two of them had done time in the penitentiary together. Ordinarily, it is true, evidence of a defendant's prior offenses is not admissible except for the purpose of impeaching his credibility as a witness.[19] *Harper* v. *United States,* 99 U.S. App. D.C. 324, 239 F.2d 945 (1956); *Fairbanks* v. *United States,* 96 U.S. App. D.C. 345, 226 F.2d 251 (1955). There are several exceptions to this rule, some of which are set forth in *Fairbanks.* One which is not, but which is applicable to this case, relates to the defense of entrapment. The rule and its rationale have been thus stated by the Supreme Court:

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[19] Such evidence is restricted to proof of actual convictions. *Freeman* v. *United States,* .... U.S. App. D.C. ...., 322 F.2d 426 (1963), relied on by appellant, is distinguishable. In *Freeman,* at the court's insistence, the Government introduced evidence of a mere arrest, which is generally inadmissible under any circumstances.

> The predisposition and criminal design of the defendant are relevant. . . . [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense. *Sorrells* v. *United States,* 287 U.S. 435, 451-452 (1932).

Another court has stated the rule more picturesquely:

> In short, if an accused asserts that he is a lamb who has been led astray he must be prepared to face evidence that he is a wolf on the prowl. *Gorin* v. *United States,* 313 F.2d 641, 653 (1st Cir.), *cert. denied,* 374 U.S. 829 (1963).

Proof of such predisposition "usually amounts to no more than that the defendant had a bad reputation, *or that he had been previously convicted.*" *Sorrells* v. *United States, supra* at 458 (concurring opinion) (emphasis added); see *Hansford* v. *United States,* 112 U.S. App. D.C. 359, 303 F.2d 219 (1962). Past offenses proved in this manner need not be identical to the offense for which the accused is on trial, as long as they are sufficiently similar to support an inference of predisposition. *United States* v. *Sherman,* 200 F.2d 880 (2d Cir. 1952); cf. *United States* v. *Perkins,* 190 F.2d 49, 53 (7th Cir. 1951).

Hardy raised the defense of entrapment. His counsel submitted a proposed instruction on the point (Instruction No. 3; see Tr. 118, 121-122), which the court gave to the jury (Tr. 157). Counsel urged the question to the jury in closing argument (Tr. 138). The record shows that Hardy did in fact have a prior narcotics conviction (Tr. 165-169; Information filed August 20, 1963; see footnote 2, *supra.*) Under the rule stated above the Government could quite properly have proved this conviction directly at the trial. The casual and indirect reference by Atria Harris to appellant's previous incarceration, therefore, was not erroneously admitted, and the court was under no obligation to declare a mistrial.

A cautionary instruction as to this bit of evidence might have been in order, as the court recognized (Tr. 122-123), although failure to give such an instruction would not necessarily be reversible error. *Carson* v. *United States,* 310 F.2d 558 (9th Cir. 1962); *Walker* v. *United States,* 301 F.2d 94 (5th Cir. 1962). But here such an instruction was not requested; indeed, counsel declined the court's offer to give it on the ground that he could derive some advantage from what Atria Harris had said (Tr. 123). He conceded (Tr. 110-111) that for the same reason he had not moved for a mistrial at the time Harris made the statement, and it would appear that his subsequent motion was merely *pro forma.* The record shows (Tr. 111) that the prosecutor did not expect the answer which Harris gave and that he immediately directed his questioning to a different subject (Tr. 63), presumably to avoid any undue emphasis on Hardy's prior record and any risk of prejudicial error. Appellant Hardy's counsel did indeed argue the point to the jury (Tr. 132-134, 139; see Tr. 122-123). Appellant cannot now come before this Court and say that it was error for the trial court to receive this testimony when he admittedly derived some advantage from it and sought to utilize it for his own benefit. It is absurd for him to ask this Court to let him have his cake and eat it too.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLYDE L. HARDY and LEE ROY FERGUSON, Appellants, v. UNITED STATES OF AMERICA, Appellee.	NOS. 18,079 and 18,148

Petition for Rehearing En Banc

Come now the appellants in the above-titled appeals and respectfully petition the Court for rehearing en banc of its judgment therein, as handed down on August 20, 1964. In support of such petition appellants respectfully show as follows:

1) The District Court refused a requested instruction that the testimony of a paid police informer with a criminal record should be received by the jury with care and considered by it with caution (Tr. 159-161). The testimony of this informer and that of a police officer was the only eyewitness evidence of the offenses alleged to have been committed by appellants. Both witnesses had an interest in obtaining convictions, as was pointed out by Judge Washington in his dissent herein. In

declining to reverse the convictions on the ground that the instruction was improperly refused, the majority of the panel of the Court that decided these appeals has changed the rule that has prevailed in this jurisdiction for more than 40 years. That rule was expressed in Fletcher v. United States, 81 U.S. App. D.C. 306, 307, 158 F.2d 321, 322 (1946), as follows:

> "The rule in this jurisdiction for a quarter of a century has been to require that a jury be warned in the case of evidence given by a detective engaged in the business of spying for hire."

Nothing in Cratty v. United States, 82 U.S. App. D.C. 236, 163 F.2d 844 (1947), on which the majority appears to have relied in its decision on this point, alters this rule of law; for in Cratty there was no request at the trial for such an instruction. In this case, however, the instruction was clearly and repeatedly requested at the trial (see Tr. 118, 159-161).

The majority of the Court in this case concedes that the trial court would have been "on sounder ground" had it given the requested instruction (slip opinion, p. 3); but this Court's refusal to order a new trial by reason thereof in effect gives the trial courts of this jurisdiction broad authority to disregard the "sounder" rule in the numerous cases where paid informers are used, thereby permitting the trial of criminal defendants such as the appellants under procedures less "sound" than the panel itself would wish.

The majority of the Court characterizes the trial court's refusal of the instruction as an exercise of discretion; but here the trial court was unaware of the existence of the Fletcher rule, as is

made abundantly clear in the colloquy of court and counsel at pages 160-161 of the transcript. Judicial discretion can scarcely be said to have been exercised in a case where the court acted without knowledge of a controlling precedent that negatives the very existence of that discretion.

This important change in the trial practice of this jurisdiction, which has such a direct bearing on the rights of criminal defendants, should not be adopted as a new rule of law without careful consideration by this Court en banc.

2) Appellants were allegedly observed by a police officer and an informer on August 27, 1962 acting in a manner said to be criminal, but they were not notified that their conduct was considered criminal until the passage of seven and eight months, respectively, from the date of the supposed crimes. The sole reason advanced by the Government for its failure to inform appellants of their derelictions was the asserted necessity for keeping the police officer and his informer "under cover" so that they might obtain evidence against other alleged sellers of narcotics. Appellants' contentions that this purposeful delay, persevered in by the Government for its own convenience, violated the due process clause of the Fifth Amendment and the speedy trial provision of the Sixth Amendment, especially when considered together with the additional delay before trial was had, were rejected by this Court in reliance on two cases neither of which is applicable to the circumstances of this case.

One of these cases is Nickens v. United States, 115 U.S. App. D.C. 338, 323 F.2d 808 (1963), the facts of which bear a superficial resemblance to those of the present case. But in essence they differ greatly. More than three months of the delay that took place in the

Nickens case resulted from the motion of the appellant himself, and at least one and one-half additional months from the necessity for retrial. In this case none of the delay of approximately a year can be attributed to appellants' actions, though one continuance of about six weeks was granted apparently because counsel for one of them was engaged in another case. Moreover, appellants in this case did not admit that the occurrence on which their convictions were based ever took place; on the contrary, the one appellant who took the stand denied it flatly, and said he could not remember whether he had been in the area of the supposed occurrence on the night in question (Tr. 112-115). The appellant in Nickens admitted meeting the police officer who testified against him. In Nickens there was no evidence of loss of memory or other circumstances that could have made the delay prejudicial to the accused. Here, however, there was ample evidence of loss of memory of what was supposed to have taken place almost a year before trial, both on the part of the appellant who testified, the policeman, and the informer (see, e.g., Tr. 113, 114, 117; 31, 32, 33; 69, 70). This blurring of the memory of what may or may not have happened one night almost a year before trial, induced by purposeful Government delay, hopelessly prejudiced these appellants by impairing their ability to prepare a defense.

Smith v. United States, U.S. App. D.C. No 17,106, decided February 20, 1964, the only other precedent on which the panel relied in this portion of the decision, is even less apposite. There was no purposeful failure to inform the defendant of his alleged crime in that case; the delay complained of--consisting of only some three and

one half months--occurred between indictment and trial. The report of that case recites legitimate reasons for even this short delay, including the absence of witnesses, and at least two motions relating to subsidiary issues filed by the defendant himself.

These cases are not determinative of this appeal, and the serious issues arising under the Fifth and Sixth Amendments as they apply to this case remain unanswered. They should receive the careful consideration of all the judges of this court.

3) This Court denied appellant Hardy's contention that the trial court erred in refusing to grant a mistrial upon the introduction by the Government of evidence that he had been convicted of a prior offense unrelated to the offense charged.

The Court (slip opinion, p. 2) appears to rest its holding on the ground that the disclosure by the Government was inadvertent and that the trial judge offered to give a corrective instruction. Neither the Government nor the Court cited any authority in support of this view and appellants have found none. The general rule, well established in this jurisdiction, is that admission of evidence of a defendant's prior offenses is ordinarily reversible error. Hansford v. United States, 112 U.S. App. D.C. 359, 365, 303 F.2d 219, 225 (1962); Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956).

The rule protects the accused by directing a mistrial. A corrective instruction to the jury clearly affords substantially less protection than does the mistrial to which the accused is entitled. The rule is for the protection of the accused, and it should be of no significance whatever that he has been hurt by inadvertence rather than

design--the prejudice exists in either case. This rule, like most, has its exceptions. But the Court does not bring the trial court's action within any of the established exceptions. In effect it has carved out a new rule by modifying the old rule out of existence. The Government sought to bring the case within the entrapment exception to the rule, forgetting that entrapment was not argued below until after the fatal disclosure had been made.

Such a drastic change in a long-standing rule that affects the basic right of criminal defendants to a fair trial should not be adopted. It should at the very least be subjected to the careful consideration of this Court en banc.

4) In the fourth, fifth, and sixth lines of this Court's opinion as it is printed at page 2 of the slip sheet (the ninth, tenth, and eleventh lines on the page) the Court states one of appellants' contentions as follows:

> "(a) that they were denied a speedy trial after arrest (Hardy's arrest on March 19 and Ferguson's on April 27, 1963; joint trial on August 19, 1963);"

This statement is an incorrect summary of appellants' argument under this head. That argument is stated at pages 11-21 of appellants' brief and appears in summary form as follows on page 17 of that brief:

> "Appellants were tried almost exactly a year after commission of the alleged offenses upon which their indictments were based. This year consisted of seven to eight months between commission of the alleged offense and arrest of the appellants, and four to five months thereafter until trial. The latter delay may not have been in itself excessive; the former, however, is neither excused nor excusable. Together they form a gross period so lengthy as to deprive appellants of their constitutional right to a speedy trial in the circumstances of this case."

Appellants did not, at oral argument or otherwise, limit this ground of appeal to the period after arrest. Rather, the gross period of almost a year was relied upon, with stress being put on the period of seven to eight months between the commission of the alleged offenses and arrest.

Appellants recognize that correction of this misstatement in the Court's opinion would have no effect on the Court's judgment of affirmance herein; but in the event that this petition for rehearing is in other respects denied, appellants contemplate the filing of a petition for certiorari with the Supreme Court of the United States to review such judgment. If the opinion of this Court is not altered upon rehearing and if the quoted language is not corrected, the record before the Supreme Court, which would include the opinion but exclude appellants' briefs, may therefore suggest that Sixth Amendment grounds for reversal as presented to this Court were different from what they in fact were. In consequence these grounds may appear different from the grounds that will be urged upon the Supreme Court. Should this occur, the chance that such a petition would be granted might be substantially lessened, to appellants' prejudice. The incorrect language quoted above from this Court's opinion in this case would be correct if it were made to read as follows:

> "(a) that they were denied a speedy trial by reason of the delay between the commission of the alleged offense on August 27, 1962 and the trial held on August 19, 1963;"

If this correction were adopted the next portion of this Court's opinion could be amended to read as follows:

"(b) that this delay deprived them of a fair trial in violation of due process of law;"

WHEREFORE, appellants respectfully petition that the judgment of this Court as handed down August 20, 1964 be reheard by the Court en banc.

Respectfully submitted,

Edward G. Howard

Edward G. Howard

Carl V. Lyon

Carl V. Lyon

Attorneys for Appellants
appointed by this Court

September 3, 1964

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing petition for rehearing is presented to the Court in good faith and not for delay.

Edward G. Howard

Edward G. Howard

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 1964 I served the foregoing petition upon David C. Acheson, United States Attorney, by mailing him a copy thereof, first-class postage prepaid, addressed to his office at the United States Court House, Washington, D. C.

Edward G. Howard

Edward G. Howard